United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2083

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES *ex rel.* CHARLES ANGELO SPATARO,

Relator-Appellant,

vs.

UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF NEW YORK,

Respondent-Appellee.

BRIEF FOR THE APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

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United States Court of Appeals

For the Second Circuit

Docket No. 75-8116

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CHARLES ANGELO SPATARO,
Relator-Appellant.

vs.

UNITED STATES MARSHAL FOR THE
WESTERN DISTRICT OF NEW YORK,
Respondent-Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

CHARLES ANGELO SPATARO was convicted in Canada for attempted arson, conspiracy to commit arson, placing an explosive substance with intent to destroy or damage and possession of an explosive substance with intent to cause serious damage to property. He was sentenced to fourteen years incarceration on this conviction. Appendix 9. While serving his sentence at the Warkworth Institution in Canada, he was granted a "temporary absence" in June of 1974 and failed to return to finish his sentence. Appendix 8.

Extradition is now being sought by the government of Canada so that the appellant can fully execute that sentence.

Statement of Facts

Except as may be specifically noted on the appropriate points in the argument, the Statement of Facts prepared by the appellant is sufficient.

POINT I

The offenses for which the fugitive has been convicted in Canada are offenses for which extradition may be had under the applicable treaties.

Under Article X of the Treaty between the United States and Great Britain, August 22, 1842, 8 Stat. L. 572 as set forth in Appendix 11, arson is an extraditable offense. Under the terms of the Convention between the United States and Great Britain, July 12, 1889, 26 Stat. L. 1508 as set forth in Appendix 11, it is supplemental to Article X of the *1842 Treaty*. Under Article I of the *Convention of 1889*, "extradition is also to take place for participation in any of the crimes . . . provided such participation be punishable by the laws of both countries". In Article VII of the *Convention of 1889* extradition is to be had for persons convicted of a crime whose sentence therefor shall not have been executed.

It is under the above provisions that the Government of Canada is seeking the extradition of the appellant, CHARLES ANGELO SPATARO. Under the above-cited provisions of the applicable Treaties, the crimes for which CHARLES ANGELO SPATARO was convicted are extraditable offenses.

A country has no right to demand extradition of a fugitive unless such right is provided in a treaty. *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933); *Valentine* v. *U.S. ex rel. Neidecker*, 299 U.S. 5 (1936).

Extradition is a right conferred by an agreement or a treaty between two nations and is therefore of a contractual nature. When interpreting a treaty its contractual nature should be considered. The intent of the parties in entering the treaty as well as the interpretation which the parties themselves give to the treaty become important factors in its interpretation.

That these treaties are clearly intended to facilitate the deliverance of a fugitive from justice from asylum countries for offenses enumerated in the treaties is clear from the language used therein.

The interpretations of the above-cited treaties given by the contracting parties in this case are also clear. The government of Canada has requested that CHARLES ANGELO SPATARO be returned to that country to finish serving his sentence on his convictions of attempted arson, conspiracy to commit arson, possession of an explosive substance, and placing an explosive substance with intent to destroy property. This is evidenced by the request by the Canadian Embassy contained in Appendix 11. The Canadian government therefore has interpreted these treaties to include the offenses for which the appellant was convicted.

The United States Department of State has also interpreted the treaties herein involved to mean that extradition can be had under these treaties for the crimes for which CHARLES ANGELO SPATARO has been convicted by honoring that request. Appendix 11.

Where there exists some doubt as to the construction of a treaty, the interpretations given to that treaty by the political departments of the governments may be looked at by the court. While such interpretations are not binding or conclusive, they should nevertheless be given some weight. *Factor* v. *Laubenheimer, supra,* at 295; *Charlton* v. *Kelly,* 229 U.S. 447 (1912) at 468.

The appellant urges the view that the offenses enumerated in the treaty do not include lesser degrees of the same offense such as an attempt. In support of this proposition, *In Re Kelly* 14 Fed. Cases 234 (S.D.N.Y. 1874) is cited. This case held that under the *1842 Treaty* with Great Britain one charged with manslaughter could not be extradited because manslaughter

was not a listed crime under the treaty. Even though murder was one of the listed offenses the Court stated that murder did not include the lesser crimes falling thereunder.[1]

In Re Kelly, however, is inapplicable to the case at bar because this case preceded the *Convention of 1889* which added to the crimes for which extradition may be had.

The Convention of 1889 renders the holding of the *Kelly* case (decided in 1874) moot because it provides for extradition for "the lesser degree" of murder by making manslaughter an extraditable offense.

Although there is little historical material available relating to the *Convention of 1889* it could be inferred from the above that the parties to the *Convention* did not intend to have extradition treaties construed as strictly as was done in the *Kelly* case. That extradition was to be had for "lesser degrees" of the crimes enumerated.

Article I of the *Convention of 1889* provided for extradition of additional crimes. In the last paragraph of that Article extradition is also provided, ". . . for *participation* in any of the crimes mentioned . . .". [emphasis added].

This "catch-all" phrase when read in conjunction with the *Treaty of 1842* and the rest of the *Convention of 1889* should be interpreted to include lower degrees of the crimes enumerated as well as associated crimes which pertain to or are related to the extraditable offenses.

That the "participation clause" to the *Convention* meant to include fugitives with lesser degrees of culpability or lesser degrees of participation other than the principal offender of

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[1] See *In Re Palmer* 18 Fed. Cases 1016 No. 10,679 (E.D.Pa., 1873) which holds contrary. Here the Court held that manslaughter was extraditable under the 1842 Treaty because that offense was within the generic description of the term murder as used in the Treaty.

the crime, is obvious. Otherwise, this clause would be redundant and meaningless.

Extradition was already provided for in Article X of the *1842 Treaty* and also Article I of the *Convention of 1889* for such persons who were the principal offenders of those crimes. Article X provides for extradition of "all persons being charged with" the specified crimes. This phrase also is applicable to the crimes enumerated in Article I of the *Convention of 1889*. Extradition could already be had for co-defendants of a crime under the terminology of Article X as long as they were also "charged" with the crime. Therefore, "participation" does not refer to a co-defendant because they were already extraditable.

Rather, "participation" should be read so as to expand the acts for which extradition can be had, instead of limiting it to persons who were already extraditable under other terms of the treaties. If this clause does not apply to the prime offender of a crime or a co-defendant of equal culpability it must apply to perpetrators of "lower degrees" of an offense and to participation in crimes associated and related to the substantive offenses, such as crimes of conspiracy and attempts.

A conspiracy to violate one of the enumerated substantive offenses has already been held to be extraditable as participation in such crimes.

In *Greene* v. *United States*, 154 F. 401 (5th Cir. 1907) the Court was also dealing with the "participation clause" of the *Convention of 1889*. In that case two fugitives were returned to the United States from Canada to answer charges of conspiracy to defraud and conspiracy to embezzle. The defendants contended that they could not be tried for these crimes because they were extradited from Canada for "participation in fraud" and "participation in embezzlement". The Fifth

Circuit held in that case that "participation" and "conspiracy" were the same and that these defendants could be tried for conspiracy.

Under principles of treaty construction the "participation clause" should be interpreted to include the crimes for which the appellant was convicted.

It is well-settled that extradition treaties are to be most liberally interpreted in order that the purpose of the treaties, *i.e.*, to surrender fugitives so that they may be brought to justice, can be accomplished. In order to carry out the treaty obligation, "it should be construed more liberally than a criminal statute or a technical requirement of criminal procedure". *Factor* v. *Laubenheimer, supra,* at 298. See also *Valentine* v. *United States ex rel. Neidecker,* 299 U.S. 5 (1936); *Grin* v. *Shine,* 187 U.S. 181 (1902); *Collins* v. *Loisel,* 259 U.S. 309 (1922); *Wright* v. *Henkel,* 190 U.S. 40 (1902) and in the Second Circuit, *First National City Bank of New York* v. *Aristaguieta,* 287 F.2d 219 p. 226 (2d Cir., 1960) and *United States* v. *Stockinger,* 269 F.2d 681 (2nd Cir. 1959).

Courts in interpreting extradition treaties should do so in a manner expanding such treaties, rather than narrowing their meanings. As the Supreme Court said in *Factor* v. *Laubenheimer, supra* at pp. 293-294:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Unless the above principles, which have been consistently followed by the Supreme Court, are not to be ignored, their application to the case now before the Court requires the extradition of CHARLES ANGELO SPATARO.

POINT II-A

The evidence was legally competent to show the criminality of the appellant.

Article VII of the *Convention of 1889* provides that extradition shall be had for persons convicted of the crimes named and specified whose sentence therefor shall not have been executed. Article VII further provides:

> In the case of a fugitive criminal alleged to have been convicted of a crime of which his surrender is asked, *a copy of the record of the conviction and of the sentence of the court for which such conviction took place duly authenticated shall be produced,* together with the evidence proving that the prisoner is the person to whom such sentence refers. [emphasis added]

At the extradition hearing had herein, the government produced the "copy of the record of the conviction and of the sentence of the Court before which such conviction took place". (App. 10 and 11). The government also produced evidence "proving that the prisoner is the person to whom such sentence refers" as is required under the treaty.

The government produced Leon McAuley who was the Living Unit Supervisor in the penitentiary where the appellant was serving his sentence who identified the appellant as being the fugitive. See Appendix 2, pp. 4-10. The government further put into evidence the affidavit of William Cecil Westlake, Director of the Warkworth Institution dated August 20, 1974 which identified CHARLES ANGELO SPATARO as being an inmate at that institution who had escaped in June,

1974, such identification being made by means of photograph attached to that affidavit. See Appendix 8.

The record of conviction and sentence was duly authenticated as is required by the treaty. Title 18, U.S.C., § 3190 provides that:

> ... depositions, warrants, or other papers or copies thereof, offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of a foreign country from which the accused parties shall have escaped and a certificate of the principal diplomatic consular or officer of the United States resident of such foreign country shall be proof that the same so offered, are authenticated in the manner required.

Under the above-quoted section the affidavits with the attached certificates of conviction and record of sentence (Appendices 10 and 11) were offered and received into evidence along with the other extradition documents at the extradition hearing. Appendix 4 is the required certificate of the principal consular officer of the United States which establishes that these documents "are authenticated in the manner required" and therefore, these documents were properly received into evidence. A copy of the record of conviction and of the sentence of the Court for which such conviction took place were therefore duly authenticated at the extradition hearing herein.

The evidence of criminality before the Court at the extradition hearing was exactly what is required by the treaty and therefore legally competent to establish appellant's criminality.

Under Article X of the *Webster-Ashburton Treaty of 1842*, extradition is to be had for the crime of arson. As noted

above, the *Convention of 1889* expands the crime for which extradition can be had for participation in any of the crimes mentioned provided such participation be punishable by the laws of both countries. Therefore, there must be a showing that crimes for which the fugitive has been convicted in Canada and for which he is to be extradited, are also punishable by the laws of this country.

Generally, in cases of extradition, the act on account of which extradition is demanded must be a crime in both countries. This is especially true in cases where the treaty embodies that principle by its terms by requiring it to be "made criminal by the laws of both countries". However, if the offense charged is criminal by the laws of the demanding country and by the law of the state of the United States in which the alleged fugitive is found, it comes within the treaty and is extraditable. *Wright* v. *Henkel, supra.*

Under *Collins* v. *Loisel, supra,* ....., it is not necessary that the name by which the crime is described in the two countries be the same, nor that the scope of the liability be co-extensive, or, in other respects, the same in each; it is enough if the particular act charged is criminal in both jurisdictions.

Judge Curtin in the Certificate of Extraditability which he handed down on April 3, 1975 made a finding that the crimes of attempted arson and conspiracy to commit arson are felony offenses punishable by the laws of Canada and also felony offenses punishable under the criminal laws generally enforced in this country. App. 12 (at P. 6).

There are two ways in which it could be determined that the acts for which the fugitive, CHARLES ANGELO SPATARO was convicted, are also "felony offenses punishable under the criminal laws generally enforced in this country".

The first way would be to look at the acts committed by the appellant and see if they are generally punishable by the laws

of this country. This is not possible in the case at bar due to the fact that the record is silent as to the actual acts committed by the appellant.

The second method in which to determine whether the acts for which Spataro had been convicted in Canada are punishable by the laws of both countries is to compare the definitions both countries give to these crimes.

The record of conviction and the certificate of sentence show that appellant was convicted of conspiracy to commit the offense of arson, attempted arson, placing of an explosive substance with intent to destroy or damage, and possession of an explosive substance with intent to cause serious damage to property. App. 9. When these crimes, which are defined in App. 10 are compared with the crimes generally punishable by the laws of the United States[2] and the laws of New York State,[3] it can readily be seen that the crimes for which Spataro has been convicted in Canada are punishable by the laws of both the United States government and the laws of New York State.

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[2] Under Title 18, U.S.C., § 81, a person has committed arson who "... willfully and maliciously sets fire to or burns, or *attempts* to set fire to or burn any building, structure or vessel, any machinery or building materials or supplies, ..." [emphasis added]. Under Title 18, U.S.C., § 371, conspiracy is committed "when two or more persons conspire ... to commit any offense against the United States ... and one or more such persons do any act to effect the object of the conspiracy ...".

One of the crimes for which Spataro was convicted was the placing of an explosive substance with intent to destroy or damage. This would constitute the requisite overt act necessary to violate the conspiracy section.

[3] Under § 150 of the New York Penal Law a person is guilty of arson when he damages a building by intentionally starting a fire or causing an explosion.

Under § 145.12 of the New York Penal Law, a person is guilty of criminal mischief in the first degree when with intent to damage property of another

(Footnote continued on following page)

By comparing the definitions of the crimes of arson, conspiracy and attempt and other related offenses which are punishable in the United States, the State of New York and in Canada, it can be seen that the crimes for which Spataro has been convicted are punishable by the laws of both countries.

POINT II-B

The variance between the complaint and the evidence presented at the hearing is not fatal to the extradition of the appellant.

The complaint charges that "CHARLES ANGELO SPATARO is duly and legally charged with having committed and been convicted of and sentenced for the crime of arson in Canada, having escaped and been illegally at large while serving time pursuant to said sentence". Appendix 1.

The proof presented at the extradition hearing shows that CHARLES ANGELO SPATARO has been convicted of conspiracy to commit arson, attempted arson, placing an explosive substance with intent to destroy or damage, and possession of an explosive substance, with intent to cause serious damage to property. Appendix 9. That he was serving

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(Footnote continued from preceding page)

person ... he damages property of another person by means of an explosive.

Section 105 of the New York Penal Law provides a person is guilty of a conspiracy when with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and under § 105.20, as under Title 18, U.S.C., § 371, there must be an overt act, which is present in this case. (See footnote 2).

Section 110.00 of the New York Penal Law provides a person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such a crime.

the sentence thereon (App. 8), and that he had escaped and been illegally at large while serving time pursuant to said sentence (App. 7).

The only variance between the allegations in the complaint and the evidence presented at the hearing is that Spataro had been convicted of conspiracy to commit arson and attempted arson, and other related crimes, rather than arson as alleged in the complaint. The fact that the appellant had been convicted, that he was serving a sentence and that he had escaped and was at large were all supported by evidence introduced at the hearing.

The complaint provided the appellant and the Honorable John T. Curtin with sufficient information to apprise the defendant of the nature of the charge against him and to show the Court that an extraditable offense had been committed. This is all that is required of the complaint. *In Re Wise*, 168 F.Supp. 366 (S.D., Tex. 1957).

If the complaint is sufficiently explicit to inform the accused of the precise nature of the charge it is sufficient, *Ex Parte Sternamann*, 77 F. 595 (D.C.N.Y. 1896) *aff'd.* 80 F. 883 (2d Cir., 1897).

The complaint herein informed both the Court and the fugitive that he was wanted because he was a convicted criminal who had escaped and not completed his sentence. It also set forth, although imprecisely, the generic nature of the crimes for which he was convicted.

Under the authority of *Glucksman* v. *Henkel*, 221 U.S. 508 (1910) a minor variance between the evidence and the complaint is not fatal to an extradition proceeding. Furthermore, technical objections to extradition proceedings are not to be favorably considered. *In Re Neeley*, 103 F. 626 (S.D.N.Y. 1900), *aff'd.* 180 U.S. 126 (1901).

The above-noted variance between the evidence and the complaint is not fatal to the extradition of CHARLES ANGELO SPATARO.

POINT II-C

The appellant was properly identified as the fugitive sought by the government of Canada.

Appendix 8 is the affidavit of William Cecil Westlake, Director of the Warkworth Institution, a penitentiary operated and administered by the Canadian Penitentiary Service. This affidavit establishes that CHARLES ANGELO SPATARO was incarcerated at the Warkworth Institution and was granted a "temporary absence" from that institution in June of 1974 and failed to return from that absence. This affidavit further establishes that Mr. Westlake was personally familiar with CHARLES ANGELO SPATARO and has identified the photograph attached to the affidavit as Exhibit A as depicting CHARLES ANGELO SPATARO. Depositions and a photograph are proper to establish the identity of the accused in an extradition hearing. *Bagley* v. *Starwich*, 8 F.2d 42 (9th Cir., 1925); *Glucksman* v. *Henkel, supra.*

In addition to the deposition and photograph above, the appellee presented the testimony of Leo McAuley, who is a Living Unit Supervisor at the Warkworth Institution. Mr. McAuley testified that as Living Unit Supervisor he was supervisor for CHARLES ANGELO SPATARO until June, 1974 when Spataro was granted a "temporary absence" and did not return to the Institution. Mr. McAuley further testified that he is personally familiar and acquainted with CHARLES ANGELO SPATARO and while testifying made a positive in-court identification of the appellant. Appendix 2 (T.4 through 9). Mr. McAuley testified that the appellant was

under his supervision for roughly 15 or 16 months and that during that period he had probably had occasion to talk to the appellant hundreds of times App. 2 (T-6). When asked by the court whether there was any question in his mind that this was the same individual incarcerated in the Warkworth Institution, the witness responded, "Absolutely not" App. 2 (T-9).

Since depositions and a photograph are proper to establish identity of a fugitive under *Bagley* v. *Starwich, supra,* and *Glucksman* v. *Henkel, supra,* and in the extradition hearing of CHARLES ANGELO SPATARO, such evidence was offered, and in addition thereto, a positive eye-witness in-court identification of the fugitive, was made, the identification of the appellant at the hearing was more than legally sufficient and the appellant was properly identified. As Judge Curtin stated, when certifying the appellant's extraditability, "I am satisfied from the evidence that the CHARLES ANGELO SPATARO sought by Canadian authorities and the CHARLES ANGELO SPATARO arrested in this District for extradition and at present before the court are one and the same individual". Appendix 12 (p. 4).

Review by means of *Habeas Corpus* cannot be used to rehear the findings at an extradition hearing, but only to determine whether there was any evidence warranting such findings. *Fernandez* v. *Phillips,* 268 U.S. 311 (1925).

Since there was legally competent evidence which warranted a finding by Judge Curtin that the appellant was the individual sought by Canadian authorities, such finding should not be disturbed on appeal.

POINT III

Appellant's constitutional rights have not been violated in the extradition proceedings.

Appellant urges that because of unfavorable publicity in this case that these proceedings are not conducive to a fair hearing which the appellant is entitled to under due process of law of the Fifth Amendment.

There has been no showing as to how extensive this publicity was, when this publicity occurred, or how it has harmed the appellant or denied him of due process of law.

The appellant urges that the adverse publicity in this case deprived the appellant of a fair and impartial hearing and may have affected the decision making involved. Therefore, if the decision reached in the extradition hearing is allowed to stand, the appellant will be deprived of his due process rights.

There is nothing in the record to substantiate this. There is just a bare allegation of unfavorable publicity without any showing as to how this has deprived the appellant of a fair or impartial hearing. The appellee will let the record speak for itself as set forth in Appendix 2.

The evidence presented at the hearing was legally sufficient for a finding of extraditability and that finding by Judge Curtin should not be disturbed on this ground.

POINT III-A

That the extradition request by the Canadian government was prompted by political motives.

The appellant urges that the Canadian government has requested the extradition of CHARLES ANGELO SPATARO due to political motives.

Under Article II of the *1889 Convention Treaty*, a fugitive criminal shall not be surrendered if the offense in respect of which the surrender is demanded be one of a political character, or if he proves that the requisition for surrender has in fact been made with a view to try to punish him for an offense of a political character.

Political offenses have been defined as only those offenses which are incidental to or form a part of a political disturbance such as an uprising or a civil war. *In Re Extradition of Gonzales*, 217 F.Supp. 717 (D.C.N.Y., 1963); *Garcia-Guillern* v. *United States*, 450 F.2d 1189 (5th Cir., 1971), *cert. den.*, 405 U.S. 989 (1972). The crimes for which the appellant was convicted are not political offenses under the definition.

The appellant urges that the extradition request was prompted by political pressure. This is pure speculation and surmise on the part of the appellant and there is nothing in the record to indicate this.

Even if these allegations were taken as true, the motives of the requesting government, or whether such extradition request was made in good faith, is not a matter for the Court to decide. Such matters should be left to the Department of State. *In Re Gonzales, supra.*

Furthermore, the circumstances surrounding the offense that occurred, not the motives of the demanding government are dispositive. *Garcia-Guillern* v. *United States, supra; Ramos* v. *Dias*, 179 F.Supp. 459 (S.D., Fla. 1959) at 463.

Appellant also urges on this Court that if he is extradited there might be a reprisal by those authorities that his life and safety may be in danger. These allegations are also pure speculation and surmise on the part of the appellant and there is nothing in the record below to substantiate these allegations.

These allegations of a violation of appellant's denial of due process of law, political pressure and the possibility of retribution by the Canadian authorities should be rejected as baseless and without merit. Furthermore, since these allegations do not constitute a political offense, these issues are not even properly before this Court. Under *Fernandez* v. *Phillips, supra,* the only issues properly before the Court are whether the District Court had jurisdiction, whether the offense is within the treaty and whether there was any evidence warranting the findings of the Honorable John T. Curtin.

Conclusion

The decision of the Honorable John T. Curtin of April 3, 1975 certifying the appellant CHARLES ANGELO SPATARO for extradition and the denial of the petition for *Habeas Corpus* of April 28, 1975 should, in all respects, be affirmed.

Respectfully submitted,

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